



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Yale Materials Handling Corporation--  
Reconsideration  
File: B-226985.2, B-226986.2, B-227046  
Date: June 17, 1987

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### DIGEST

Dismissal of protest against the procuring agency's affirmative determination of the awardee's responsibility, where the protester questioned whether the awardee will comply with the specifications, is affirmed.

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### DECISION

Yale Materials Handling Corporation requests reconsideration of our April 2, 1987, dismissal of its protest against the award of two contracts to Forklifts, Inc., under request for proposals (RFP) Nos. N00104-87-R-0490 and N00104-87-R-0497, issued by the Naval Regional Contracting Center, Philadelphia, Pennsylvania, for electrically powered fork-lift trucks. Subsequent to our dismissal, Yale protested on the same basis another award by the Navy to Forklifts under RFP No. N00140-87-R-0488.

Yale protests that Forklifts will not comply with clause H35 of the RFP's, entitled "Preference For Domestic Specialty Metals," which obligates the contractor to utilize specialty metals, as defined in the clause, melted in the United States, its possessions or Puerto Rico in the parts that make up these trucks because it represents Toyota, a Japanese manufacturer. Yale argues that specialty metals will be needed to manufacture the drive and pump motor armature shafts, king pins, gears, pinions and shafts in both the drive axle and differential.

We dismissed Yale's first two protests under section 21.3(f) of our Bid Protest Regulations because they concerned the affirmative responsibility determination of Forklifts and the administration of its contracts--matters not for consideration by our Office. See 4 C.F.R. §§ 21.3(f)(1) and (5) (1986).

We have consistently held that whether a bidder or offeror is capable of complying with the specialty metals clause and

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certification concerns the bidder's or offeror's responsibility. See Pacific Fabrication, B-219837.2, Aug. 30, 1985, 85-2 C.P.D. ¶ 263; Surgical Instrument Company of America, B-214918, May 22, 1984, 84-1 C.P.D. ¶ 551. In this regard, the awardee is obligated to perform in accordance with contract requirements as certified in the specialty metals clause. Id. Where, as here, the contracting officer makes an affirmative determination of the prospective awardee's responsibility, such determination necessarily involves a high degree of discretion and business judgment, and our Office will not review protests against such determinations, unless either possible fraud or bad faith on the part of procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. See 4 C.F.R. § 21(f)(6); TLC Systems, B-223179.2, Aug. 22, 1986, 86-2 C.P.D. ¶ 215; Pacific Fabrication, B-219837.2, supra. Moreover, whether Forklifts furnishes trucks that comply with clause H35 is a matter of contract administration, which is the function and responsibility of the procuring agency and not our Office. 4 C.F.R. § 21.3(f)(1); TLC Systems, B-223179.2, supra. Consequently, we dismissed Yale's protests.

Yale alleges that the Navy misapplied definitive responsibility criteria by accepting Forklifts' proposal on the basis of price alone without requiring information from Forklifts concerning how it planned to comply with clause H35. However, we have held that purchase descriptions and specifications, such as clause H35, which merely describe the items offerors are to supply in the event they receive the award, are not definitive responsibility criteria. See Ridge, Inc., B-222481, June 24, 1986, 86-1 C.P.D. ¶ 583; Nations Inc., B-220935.2, Feb. 26, 1986, 86-1 C.P.D. ¶ 203. A definitive responsibility criterion is a standard established by the agency for a particular procurement for measuring an offeror's or bidder's ability to perform the contract, e.g., a specific number of years of specific experience. Id. The specialty metals provision is therefore not a definitive responsibility criterion, nor has Forklifts been shown to have taken exception to clause H35 in its offer.

We have held that an agency should not automatically rely on certifications of compliance with the Buy American Act when it has reason to question whether a domestic product will be furnished. Designware, Inc., B-221423, Feb. 20, 1986, 86-1 CPD ¶ 181. Similarly, an agency should not automatically rely upon certifications of compliance with the specialty metals clause where there is reason to question the certification. In this case, we have been informally advised that prior to award the contracting officer inquired and received

additional specific assurances from Forklifts and Toyota that they would comply with the specialty metals provision and would only use domestic specialty metals.

Finally, Yale contends that the Navy's award violated 10 U.S.C. § 2305 (Supp. III 1985), which requires agencies to develop specifications in a manner necessary to obtain full and open competition because the Navy is not requiring compliance with the specification. Citing the Competition in Contracting Act (CICA), 31 U.S.C. § 3552 (Supp. III 1985), Yale argues that our Office cannot dismiss the protest since it has the responsibility to consider any protest alleging the violation of statutory requirements.

Yale misconstrues CICA in asserting that our Office is required to consider the merits of any protest if a violation of a statute is alleged. Our Office is authorized by 31 U.S.C. § 3554(a)(3) to dismiss a protest that is on its face does not state a valid basis of protest. Our Bid Protest Regulations implementing CICA specifically state that protests of affirmative determinations of responsibility and contract administration will be summarily dismissed. 4 C.F.R. §§ 21.3(f)(1) and (5). Therefore, we affirm the dismissal of Yale's protest.

Regarding the protest against the third contract awarded to Forklifts, Yale makes essentially the same arguments that a non-United States manufacturer cannot comply with clause H35. Again Yale has failed to allege or show that Forklifts took exception to the clause in its offer. Consequently, this protest is dismissed for the same reasons.



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General Counsel